

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 2509 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed : NO  
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

1 to 5 NO.

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PATEL BHARATKUMAR SHANKERLAL

Versus

VANKAR MAHESHKUMAR JETHALAL  
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Appearance:

MR MEHUL SHARAD SHAH for Petitioner

MR MUKTESH V PATEL for Respondent No. 1

MR DARSHAN M PARIKH for Respondent No. 3  
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CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 13/09/1999

C.A.V.JUDGMENT

The appellant by filing this appeal under Section 173 of the Motor Vehicles Act, 1988, ( to be referred to as "the Act" for short) has questioned the judgment and award dated December 22, 1995, of the Motor Accident Claims Tribunal (Main), Mehsana, in Motor Accident Claim

Petition No.1859/88 by which the tribunal awarded the sum of Rs.40,600/- with interest at the rate of 15 % per annum from the date of application till realization of the amount, and proportionate costs, to be realized from the respondent Nos. 1 and 2 jointly and severally, by exonerating the opponent No.3-Insurance Company from the liability to pay the compensation.

2. The brief facts of the case are as under :

On October 26, 1988 at about 7-30 a.m. the appellant was walking on Thor-K-Unza road, at that time, auto rickshaw No.G.R.W.9217 owned by respondent No.2 and driven by the respondent No.1 came in full speed and in a rash and negligent manner and dashed with the appellant forcefully, as a result, the appellant fell down and sustained injuries on both the legs. He was immediately removed to the Cottage Hospital, Unza and was thereafter shifted and admitted in the hospital of Dr. Jayant Patel where he remained as an indoor patient for 20 days. The appellant had sustained fracture of shaft femur on his right hand and an operation was performed in the hospital of Dr. Jayant Patel and an iron plate came to be inserted to support the fractured bone. The appellant had to remain in bed for 4 to 5 months and suffered severe pain, shock and agony. The appellant therefore, filed the abovereferred Motor Accident Claim Petition under Section 166 of the Act claiming compensation of Rs.80,000/- for the vehicular injuries suffered by him in the vehicular accident which took place on October 26, 1988, from the respondent Nos. 1,2 and 3 jointly and severally.

3. The respondent Nos. 1 and 2 though duly served with the summons neither appeared before the tribunal nor submitted their written statements. Hence, the claim petition came to be proceeded ex-parte against them.

4. The respondent No.3-Insurance Co. filed its written statement at Exh.17, inter-alia denying all the averments made in the claim petition. The Insurance Co. contended that the accident had taken place on October 26, 1988 at 7-30 a.m., whereas the insured (respondent No.2) approached the agent of the Insurance Company Shri P.U.Jani at 4-00 p.m. and applied for the insurance of the auto rickshaw in question. It was further contended that at the time of submitting the proposal form, the factum of the accident was not disclosed. It is contended that the agent Shri P.U. Jani issued cover note at 4-00 p.m., whereas the policy was issued at 4-45 p.m. In the light of above facts, the Insurance Co. contended that the risk under the policy only began from

4-45 p.m. onwards. The Insurance Co. specifically pleaded that at the time of accident there was no insurance policy covering the risk of the vehicle in question, and therefore, the Insurance Co. is not liable to pay any amount of compensation to the appellant. In the alternative, the Insurance Co. contended that the insured has not disclosed the material facts regarding the accident, hence the policy was void on the ground of nondisclosure of material facts. The Insurance Co. further contended that as per the provisions of Section 64 (V) (B) of the Insurance Act, 1938, the risk starts only after receipt of premium, in the present case after 4-00 p.m., and therefore, the Insurance Company should not be saddled with the liability of payment of compensation to the appellant.

5. In view of the pleadings of the parties, the tribunal framed issues at Exh.23. The appellant examined himself at Exh.26 and produced documentary evidence such as complaint, panchnama, injury certificate of Cottage Hospital, Unza, certificate issued by Dr. Jayant Patel, copy of insurance policy, report of the pathological laboratory etc.

6. The appellant also examined Dr. Lalbhai M. Patel in support of his case that he has suffered permanent disability on his right leg. The certificate issued by Dr. Lalbhai Patel is produced at Exh.40. On behalf of the Insurance Co. the Divisional Manager Mr. Raj Maheshwar Dahyabhai was examined at Exh.43. The witness produced cover notes from Exh.44 to 48. The witness also produced proposal form filled in by the injured at Exh.53 and the insurance policy of the auto rickshaw in question at Exh.54.

7. The tribunal on appreciation of oral as well as documentary evidence awarded the sum of Rs.40,600/- with proportionate cost of the application as well as interest at the rate of 15 % per annum from the date of application till realization of the amount, to be recovered from the respondent Nos. 1 and 2 i.e. driver and owner of auto rickshaw No.GRW 9217, jointly and severally. The tribunal exonerated the respondent No.3-Insurance Co. from the liability to pay the compensation which has given rise to the filing of this appeal by the appellant-original claimant.

8. Learned counsel for the appellant and the learned counsel for the respondent No.3 have taken me through the record and proceedings of this appeal. Learned counsel for the appellant vehemently argued that as per the cover

note Exh.33 issued by the agent of the Insurance Co., the owner of the auto rickshaw bearing No.GRW 9217 had paid premium on 26-10-88 at 4-00 a.m., and therefore, the risk commenced from 26-10-88 at 4-00 a.m. It is submitted that the premium of insurance was paid and cover note was issued by the authorized officer of the insurer at 4-00 a.m. Learned counsel for the appellant submitted that admittedly the accident had taken place at 7-30 A.M. on October 26, 1988, and therefore, when the accident took place, the auto rickshaw was already insured with the Insurance Co. Learned counsel for the appellant in support of the contention that if the specific time is mentioned in the policy, then the policy will commence from that specific time mentioned in it, placed reliance on the decision of the Supreme Court reported in 1997 (1) SCC, page 66, National Insurance Co. vs. Jitubhai Nathubhai Dabhi. The facts before the Supreme Court were that the policy was renewed on October 25, 1983 at 4-00 p.m. and the accident had occurred on 25-10-83 at 11-40 a.m. and in view of these facts, the Supreme Court upheld the contention of the Insurance Co. that when the accident had taken place, there was no renewal of the policy, and therefore, the Insurance Co. was not liable to pay the compensation. Learned counsel for the appellant also invited my attention to a decision reported in (1998) 1 SCC, 365, Oriental Insurance Co.Ltd. vs. Sunita Rathi & Ors. In the said case the accident had occurred on December 10, 1991 at 2-20 p.m. and the insurance policy and the cover note were obtained by the insured at 2-55 p.m. In the cover note as well as in the policy issued by the Insurance Co. it was specifically mentioned that the effective date and time of commencement of insurance for the purpose of the Act was December 10, 1991 at 2-55 p.m. The Supreme Court in the said case held that the insurer cannot be held liable on the basis of the aforesaid policy, and therefore, the liability has to be of the owner of the vehicle. It was further held that the liability of the insurer arises only when the liability of the insured has been upheld for the purpose of indemnifying the insured under the contract of insurance.

9. On behalf of the respondent No.3- Insurance Co.

Raj Maheshwar Dahyabhai who was at the relevant time was serving as Branch Manager in Unza Branch Office, was examined at Exh.43. He deposed that the Cover-note Book starting from serial No.398081 was handed over to one Sureshbhai Patel. He deposed that cover note Exh.33 which was alleged to have been issued to the auto rickshaw involved in the accident bearing No.GRW 9217 did not bear signature of Sureshbhai Patel. Cover note

Exh.33 bears serial No.398085. The witness Exh43 deposed that cover note Exh.44 bearing serial No.398081 was issued on October 26, 1988 at 11-30 a.m. and cover note Exh.45 bearing serial No.398082 was issued at 11-40 a.m. on the same day i.e. on October 26, 1988. The witness further deposed that in cover note Exh.46 bearing serial No.398083 no time was mentioned, but it was issued on October 26, 1988. The witness also deposed that cover note Exh.47 bearing serial No.398084 was issued at 12-20 p.m. on October 26, 1988. It is significant to note that cover note number 398086 to serial number 398089 were issued between 12-00 noon and 2-00 p.m. It is worthwhile to note that cover note serial No.398085 Exh.48 equivalent to Exh.33 was issued at 4-00 a.m. The witness emphasized that cover notes are issued in order of serial numbers. It is deposed by the witness that the proposal form Exh.53 filled in by the owner of auto rickshaw No.GRW 9217 was prepared at 4-00 a.m. It is clarified by the witness that on the basis of the cover note and the proposal, the policy Exh.54 was issued at 4-45 p.m. on October 26, 1988. Thus, it becomes clear that the effective policy came into force from 4-45 p.m. When the proposal form was filled in by the owner of the auto rickshaw in question, the accident in question had already taken place in the morning at about 7-30 a.m. The owner of the auto rickshaw had not disclosed about the accident while submitting the proposal form to obtain insurance policy of the auto rickshaw bearing No.GRW 9217. In *Gandham Nagesh v. Pokala Nageswara Rao and others*, 1990 A.C.J.,257, the facts before the Andhra Pradesh High Court were that the accident had taken place at 9-20 a.m. and the insurance policy was taken at 10-10 a.m. without disclosing the fact that the accident had taken place on the very same day. In view of these facts, the High Court of Andhra Pradesh held that non-disclosure of the material about the accident is a fraud on the Insurance Co., and therefore, the Insurance Co. was not liable to pay the compensation amount. It was further held that as there was malicious intention on the part of the owner in obtaining the policy by suppressing the material fact, the tribunal was right in fixing the liability on the owner and the driver. In my view, *Gandham Nagesh's* case (Supra) with all fours will apply to the facts of this case. The owner of the auto rickshaw without disclosing the factum of accident had with malicious intention obtained the policy at 4-45 p.m. When the accident had taken place, there was no valid insurance covering the risk of the offending vehicle. It would not be out of place to mention that the owner of the auto rickshaw i.e. respondent No.2 had obtained the policy without disclosing the factum of accident, and

therefore, the policy was obtained by fraud. It is significant to note that cover note Exh.Nos. 44 to 47 bearing serial Nos. 398081 to 398084 were issued after 11-30 a.m. The cover note in respect of the auto rickshaw in question bearing No.GRW 9217 bearing serial No.398085 is subsequent to the serial numbers stated above was alleged to have been issued at 4-00 a.m., which in my view, raises serious doubt about the time mentioned in the said cover note. The witness Raj Maheshwar Dahyabhai in clear terms had deposed that the cover notes were issued in serial numbers. It is an admitted fact that the proposal form was filled in by the owner of the auto rickshaw at 4-00 p.m. and the policy Exh.54 was issued at 4-45 p.m. on October 26, 1988. Therefore, at the time of accident the vehicle in question was not at all covered by the insurance policy. However, it is submitted by the learned counsel for the appellant that the cover note was issued at 4-00 a.m., and therefore, there was a valid coverage of the auto rickshaw in question, and therefore, the Insurance Co. should indemnify the owner with regard to the compensation awarded to the claimant. In my view, the submission of the learned counsel for the appellant deserves to be rejected. The issuance of cover note Exh.33 at 4-00 a.m. as stated above is doubtful as preceding cover notes were issued after 10-00 a.m. and there was no reason why the cover note bearing serial No.398085 was issued at 4-00 a.m. To remove the clouds of suspicion, the appellant ought to have examined the owner or the person issuing the cover note to clarify the position how the cover note was issued at 4-00 a.m. As per the principles laid down by the Apex Court, if the time is mentioned in the policy, the risk would commence from the time mentioned in the policy and not from the time mentioned in the cover note. In view of Section 64-V-(b) the risk would commence only on payment of the premium of the policy. Section 64-V (b) of the Insurance Act, 1938, reads as under :

64-V-(b) "No risk to be assumed unless  
premium is received in advance  
(1) no insurer was assumed any  
risk in India in respect of any  
insurance business on which  
premium is not ordinarily payable  
outside India unless and until the  
premium payable is received by  
him or is guaranteed to be paid  
by such person in such manner and  
within such time as may be  
prescribed or unless and until

deposit of such amount as may be prescribed, is made in advance in the prescribed manner.

10. In view of the above provisions, the risk of the Insurance Co. commence only on the payment of the premium either in cash or by cheque. In the present case, it is evident that the proposal form was filled in at 4-00 p.m. and after the receipt of the payment of premium, policy was issued at 4-45 p.m., by no stretch of imagination it can be inferred that the premium of the policy covering the risk of the vehicle in question was paid at 4-00 p.m. on October 26, 1988. The premium would be accepted only after the proposal form was accepted. The accident in question had taken prior in point of time of the acceptance of proposal form and the payment of the premium and the issuance of the policy. Therefore, in my view when the accident had taken place, there was no valid insurance covering the risk of the auto rickshaw bearing No.GRW 9217, and therefore, the tribunal was quite justified in holding that when the accident had taken place, there was no valid insurance policy covering the risk of the auto rickshaw in question, and therefore, the Insurance Co. was not liable to pay compensation.

11. With regard to the quantum of compensation awarded to the appellant-claimant, in my view, no interference is called for because the tribunal had taken into consideration all the facts and circumstances of the case and has awarded just compensation to the appellant, and therefore, the finding of the tribunal with regard to the award of compensation in favour of the appellant does not require any interference.

12. As a result of the foregoing discussion, the appeal is dismissed.

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